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No. 98-825

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMIEL CUETO,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Amiel Cueto submits this Reply to the Brief of the United States in Opposition to the Petition for a Writ of Certiorari. The government's Brief in this Court nowhere reflects that the Petitioner's conviction rests on his having filed a cert. petition in this Court that "attacked the integrity" of the Seventh Circuit, ~~nor~~ that he was sentenced for having "abused the First Amendment." This case is far more important than the government's papers suggest, and has implications for the practice of law throughout the United States.

Petitioner has sought certiorari on the question whether the omnibus clause of the obstruction of justice statute reaches any "endeavor," including quintessential litigation-related activities undertaken by a lawyer on behalf of a client, so long as the lawyer acted "corruptly." The Seventh Circuit, in this case and others, has defined "corruptly" very broadly, approving jury instructions that state that, to act "corruptly" the defendant's "main purpose" need not be "to obstruct the due administration of justice." The government has to establish only that "the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice." (Appendix to Petition for a Writ of Certiorari, hereafter "App.," at 15) Petitioner has argued that these definitions of the crime's actus reus and mens rea are too sweeping, and that the statute as construed, threatens the criminal justice system itself.

The government, in opposing certiorari, does not contend that the omnibus clause, as construed by the Seventh Circuit, does not reach litigation-related conduct, or that the Seventh Circuit in fact defined "corruptly" narrowly, thus avoiding potential criminalization of all litigation-related conduct. The government instead argues that the Court of Appeals upheld Petitioner's convictions for reasons "limited to the specific facts

of the case," and that further review is therefore not warranted.[1] (Brief of the United States, hereafter "Govt. Br.," at 6) The government is wrong. The decision of the Court of Appeals, and the construction of the omnibus clause that it endorses, extends well beyond the particular facts of this prosecution – as the participation of amici National Association of Criminal Defense Lawyers and Illinois Trial Lawyers Association demonstrates. In addition, the particular facts of this litigation underscore the dangers that an open-ended, ill-defined omnibus obstruction-of-justice clause presents to both the judicial system the statute is supposed to protect, and to the First Amendment, our nation's primary bulwark against abuses by all three branches of government.

The government argues that, "The question whether, in any particular prosecution, an attorney used the legal process for the purpose of obstructing, rather than advancing, the administration of justice ... depends on the facts." (Govt. Br. at 7) However, under our rule of law, facts must be evaluated in the context of a legal framework that gives fair notice of what is proscribed, and guides and constrains jurors in their application of the law to the facts. It does not suffice to assert, as the government implicitly does, that appellate courts can be counted

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[1] The government erroneously asserts that Petitioner does not seek review of his conviction for conspiracy. Though the conspiracy count alleged a "conspiracy to defraud the United States," as the petition for certiorari states, the alleged conspirational purposes and acts consisted of alleged obstructions of justice, which were also pled as separate substantive counts. (Petition for a Writ of Certiorari at 3) Petitioner submits that, if the convictions for obstruction of justice fail, then the conspiracy conviction would fail too. At the least, a remand would be required to consider the validity of the conspiracy conviction, in light of this Court's ruling on the obstruction of justice charges upon which it rests.

on to insure that no conviction for obstruction of justice will be upheld unless the attorney's conduct falls "far outside the range of acceptable professional representation of a client." (Govt. Br. at 8) The threat of prosecution is itself enough to chill zealous advocacy. Moreover, the Court of Appeals' affirmance in Petitioner's case itself refutes the proposition that convictions of attorneys for obstruction of justice will be possible only in clear-cut cases of attorney criminality. The Court of Appeals, after all, began its analysis by confirming the very limited role an appellate court plays in evaluating whether a conviction is supported by legally sufficient evidence. (App. 13)

Equally important, the critical factor upon which the Court of Appeals focused does not operate as a real limitation on the reach of the statute as it applies to lawyers. The Court of Appeals' decision suggests that Petitioner's conviction is valid because he was himself a criminally culpable participant in Venezia's gambling operations or racketeering enterprise, and his representation of Venezia thus protected his own illicit financial interests. The proffered limitation does not withstand scrutiny. While the prosecution did take the position that Petitioner had an interest in one tavern, Club Exposed, where Venezia had gambling machines, the evidence on this was disputed,[2] and, as the case went to the jury, this was not an essential aspect of the prosecution's case. The "financial motives" theory upon which this case was presented to the jury was much broader. As the Court of Appeals' decision reflects, most of the government's "financial motive" evidence went to showing, not that Venezia and Petitioner were partners in crime, but that they were partners in a variety of legal business ventures, which Petitioner did not dispute. (App. 8 & n.6) The government argued to the jury that Petitioner had an indirect

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[2] The government's proof was testimony of Venezia, Petitioner's former client, who had much to gain by turning on his lawyer.

interest – in the sense of concern with, not ownership stake in – the continuation of Venezia's gambling operations because those operations provided Venezia with funds to invest in lawful business ventures with Petitioner. The indictment specifically charged that theory, as the Court of Appeals recognized (App. 8-9); the government does not contend otherwise.[3] This case thus necessarily stands for the proposition that an attorney's indirect financial interest in a client's criminal ventures can supply a corrupt motive rendering the attorney guilty of obstruction of justice for legal work the attorney does on his client's behalf.

The government's related contention, that honest practitioners need not worry because much of Petitioner's litigation-related conduct was itself prohibited by the rules of professional responsibility and the canons of legal ethics, likewise provides no real restriction on the scope of the omnibus clause of the obstruction of justice statute. It ignores the specific conduct that the indictment charged as obstruction of justice: two counts based on the filing of pleadings and other court papers in federal proceedings and one based on Petitioner's efforts to persuade the local prosecutor to indict a liquor control agent (who was potentially a witness against his client) for giving false testimony.[4] Though the brief of the United States

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[3] The government does, however, insist that the Court of Appeals "simply disagreed" that Petitioner's financial interests were only indirect. (Govt. Br. at 9, n.4) That is to say, the Court of Appeals believed that Petitioner was guilty of gambling crimes. Surely, even if Petitioner had had a fair opportunity to defend against uncharged gambling crimes (which he did not), it would not be for the Court of Appeals to perform factfinding of this type.

[4] Whether or not Petitioner engaged in ethically questionable conduct in, for example, obtaining Bonds Robinson's presence at court proceedings so that Petitioner could

purports to summarize the charges in the obstruction counts, it does not even mention that one of the obstruction counts involved the filing of a petition for a writ of certiorari in this Court, which, according to the indictment, "attacked the integrity of the judges on the [Seventh Circuit] Court of Appeals." (Indictment, ¶ 32, 63-64)

On the second question Petitioner presents – that the First Amendment does have something to say about a criminal prosecution for complaining to a state prosecutor about claimed misconduct by a state law enforcement officer – the government, following the Seventh Circuit's lead, asserts that no First Amendment issue is raised because, as the Court of Appeals "found," Petitioner's complaint about the officer was false.[5] (Govt. Br. at 11-12) Even if the accusation against Robinson was false -- which remains disputed -- the constitutional question cannot so easily be avoided.

The Seventh Circuit law upon which this case was tried, and the conviction affirmed, allowed the jury to convict based on any "endeavor" with the capacity to obstruct justice, so long as it was performed with a corrupt motive. The jury was thus invited to convict Petitioner, even if it determined that his accusation against Bonds Robinson was true, as long as it found that the complaint was lodged for a corrupt purpose, such as discrediting Robinson as a potential witness.

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examine him under oath (see Govt. Br. at 3), that was not the conduct charged under the obstruction of justice counts, and could not have been, since no federal grand jury or court proceedings were then pending.

[5] According to the United States, "[H]ere the court of appeals did find that petitioner's statements to the local prosecutor were criminally motivated, 'meritless,' 'misleading,' and 'false'." (Govt. Br. at 12)

In arguing that no constitutional question is presented, the government relies on the Court of Appeals' post-hoc "finding" that Petitioner's accusation against Robinson was false.[6] But that

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[6] Petitioner argued on appeal that there was no evidence in the record sufficient to show that the charge against Robinson was false. The evidence as to whether Robinson took money from Joynt was as follows. Over defendant's hearsay objection, Haida was permitted to testify that he had a "conversation" with Joynt, asked Joynt if he had given money to Robinson, got an answer from Joynt, and "based on that answer," "did not believe that Bonds Robinson received money from Tony Joynt." (Tr. 13:111-13)

Neither Joynt nor Robinson testified. The government did not call either one to the stand, and defendant could not question them on the subject. Joynt asserted his Fifth Amendment privilege. Defendant could not examine Robinson on this subject, because of a pre-trial ruling that foreclosed efforts by the defense to "impeach" or attack Robinson.

The trial court's trial rulings also precluded defendant from introducing evidence to show that, whether or not Robinson had actually taken money from Joynt, Cueto had reason to believe that he had. Cueto was not allowed to testify that Joynt had told him that he had given Robinson money. Cueto was not allowed to testify that his law partner, Tom Daley, had told him that Joynt's wife had told Daley that her husband had given money to Robinson. Cueto was precluded from eliciting this from Daley too.

The Court of Appeals did not address the Petitioner's claim that the "evidence" of falsity was insufficient to support the conviction. It rejected Petitioner's claim that evidence as to the basis for Petitioner's actions was improperly excluded. (App. 29-30)

is itself a constitutionally impermissible basis on which to uphold the conviction. Even if, as the United States argues to this Court, there are no constitutional protections for false charges made against public officials,[7] nevertheless, there is a constitutional right to insist that the government carry the burden of proving falsity to the factfinders. Because no such proof was required, and no such finding was made by the jury, the Court of Appeals' decision can only be read to stand for the much broader proposition that any conduct, whether lawful or not, whether otherwise constitutionally protected or not, may form the basis for criminal obstruction of justice charges under the omnibus clause, if undertaken for a "corrupt" purpose, and that truth or falsity is irrelevant. When the omnibus clause of the obstruction of justice statute is used, as it was here, to prosecute conduct such as bringing official misconduct to the attention of the authorities, which is presumptively entitled to First Amendment protection, an important First Amendment question is presented.

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[7] Reckless disregard for the truth and "corrupt purpose" are not coterminous, so the existence of a corrupt purpose would not remove constitutional protection even for statements that are false.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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